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THE LACK OF JUDICIAL COGNIZANCE BY INFERIOR FEDERAL COURTS IN ADMINISTERING STATE LAW.

In Mutual Loan Company v. Martel, 32 Sup. Ct. 74, the federal Supreme Court reaffirms the view frequently expressed that, at least, in questions as to the rightful exercise of legislative power by states under the due process of law clause of the Constitution, that court should defer "to the tribunals on the spot." 216 U. S. 358, 365.

Logically extended, this principle should make state courts stand better as to judicial cognizance as to the same class of questions than inferior federal courts. Indeed, the latter tribunals should no more be considered "on the spot" than is the federal Supreme Court. Such a court is not "on the spot" as to such questions, because its jurisdiction, and therefore, the outer boundaries of its judicial cognizance, are not on, but within, "the spot."

They, therefore, do not know, of their judicial knowledge, the necessity whereby police power may override freedom of contract.

That this freedom is subject to limitation or displacement by state policy, let the following excerpt from the above-mentioned case, be deemed authoritatively to determine: "There must, indeed, be a certain freedom of contract, and as there cannot be a precise verbal expression of the limitations of it, arguments against any particular limitation may have plausible strength, and yet many legal restrictions have been and must be put on such freedom in adapting human laws to human conduct and necessities. A too precise reasoning should not be exercised and before this court may interfere there must be a clear case of abuse of power."

This case further shows, we think, that almost any theory, whereby morality, thrift, family relationship and good citizenship may, in the opinion of the state, be encouraged and their opposites be checked is within the scope of its policy.

Thus in this case its power extended to saying that assignments of future earnings for money loaned of less than $200 should be invalid against an employer, unless he accept such in writing, which shall be accompanied by the written consent of the wife and then be recorded in a public office, and it was also deemed within the state's power to apply this prohibition only to others than banks and a particular class of loan companies.

The court said: "We cannot say, that the statute as a police regulation is arbitrary and unreasonable, and not designed to accomplish a legitimate public purpose. We certainly cannot oppose to the legislation our notions of its necessity, and we have expressed 'the propriety of deferring to the tribunals on the spot.'"

The word "notions" seems an apt word for theorizing, as distinguished from reasoning guided by judicial cognizance. The former might reflect merely a mental bent or reflect a former environment, while the latter would be presumed to rise above either or both.

But this may seem something of a digression from our title. We meant to inquire whether inferior federal courts had any judicial cognizance in such questions. That they have a severely limited judicial cognizance must be admitted, unless they are superior in this regard to the federal Supreme Court, which admits its inferiority to "tribunals on the spot."

We suggest first, that they are not presumed to have any such cognizance at all as to state law, because as to jurisdiction they are casual, fortuitous, accidental and for no reason pertaining to the subject-matter of controversy. They are as foreign to this as courts of any other friendly power lending its aid to secure impartiality in the mere administration of justice. But judicial cognizance hardly is supposed to migrate with the mere arbitrary, or even

conventional, vesting of jurisdiction. It is not wholly a legal fiction, but is based on the theory that judges of the tribunals of a state know what they ought to know of the circumstances surrounding the enactment of its laws.

The federal Supreme Court gets hold of a question of this kind purely in a jurisdictional way, as arising out of subject-matter. And cognizance of national needs is presumed as, for example, the necessities of non-resident and alien and the subject of the state having uniformity of right with them. As subject-matter, however, is not the thing of moment in inferior federal courts, there is nothing for cognizance to accompany.

Secondly, it is a sort of perversion of the theory of judicial cognizance, as to circumstances justifying legislative policy, being in a court which can have but a restricted judicial knowledge. In other words, state tribunals are vested with judicial knowledge of conditions in every part of a state, and inferior federal courts in only a federal district in a state, even if they may be supposed to have that much.

Lastly it is to be said, that, other than by merely intellectual processes, a judge of a federal court has no knowledge of what is the common law of a state. The common law has been recognized more fully in some states than in others, because their courts differed as to certain parts thereof being applicable to conditions therein or not.

We take it as well-established that the common law in this country is, except as modified by legislation, as it was on July 4, 1776, and not as at the time of the adoption of the federal constitution. The former time is the test and not the latter.

But where there is no presumption of a knowledge of the common law, judicial cognizance is lacking in an important element to its presumptive sufficiency. Indeed, we might say, that a mere intellectual conclusion, however unassailable it might appear in logic, is insufficient, because it might not be what is the recognized common law of a state. The latter, whether erroneous in principle or not, is a condition that may justify a legislative declaration of policy under the federal constitution. As we have said above, in effect, half knowledge ought not to carry any presumption of judicial cognizance, and, therefore, inferior federal courts ought not to be presumed to know of any circumstances weighing for or against the rightfulness of legislation under the due process of law clause.

What we have said in regard to their knowledge of a state's common law may also be said as to their knowledge of its general statute law. If the supreme court considers it "propriety" to defer to state tribunals, these courts should feel themselves bound to follow state view on the constitutionality of state statutes.

NOTES OF IMPORTANT DECISIONS

BENEFIT INSURANCE—MEMBER BOUND BY BY-LAWS.—In 73 Cent. L. J. 351, there was discussed the application of the rule of construction in favor of assured in ordinary insurance to a certificate in fraternal insurance. We outlined the grounds of our dissent from the Missouri Supreme Court in the case there discussed, wherein it was said that the same rule applied to both kinds of insurance.

It appears to us that the Virginia Supreme Court of Appeals, in a recent case, supports, in large part, our view. Bixler v. Modern Woodmen of America, 72 S. E. 704. It happened that the same company was defendant in both cases.

The Virginia court held, that, where a payment to relieve from suspension was made by a member to an officer of a local camp under circumstances not permissible by the by-laws, and the principal officers were not aware of the circumstances, reinstatement was not thereby effected.

It was said: "Bixler being, as we have seen, conclusively presumed to have knowledge of these provisions (forbidding acceptance of the payment), knew when he paid the arrearages in his then condition of health that he had no right to make such payment, and that the clerk of the local camp had no right to accept it, and that such payment could not have the effect of reinstating him as a member of the society."

The court also spoke of the principal officers not knowing the circumstances and retention of the money therefore not working an estoppel. We went further, however, and took the position, in effect, that these officers are just as circumscribed in authority as are subordinate officers. The Virginia court had no occasion, however, to decide this point, as under the facts, this was unnecessary. Referring to another case from New Jersey in this issue, we think the distinction between ultra vires acts and those forbidden by law there treated might be enforced. A beneficial insurance company ought not to be bound by acts in excess of power like a corporation for gain, because they have no shareholders who reap the benefits of ratification, or at least not in the same way. They are organized for a quasi public purpose and their funds are in the nature of trust property that cannot be diverted by the acts of officers. Especially is this reasoning, it seems to us, applicable to beneficial insurance, where the members themselves place upon not one, but on all, of its officers limitations upon authority, of which the members are presumed conclusively to know.

CORPORATIONS — DISTINCTION BETWEEN ULTRA VIRES ACTS, WHICH ARE EXPRESSLY FORBIDDEN AND THOSE IN EXCESS OF STATUTORY POWER.—The New Jersey Court of Errors and Appeals, speaking through Swayze, Judge, whose opinions are uniformly models of clearness and precision, shows, that a court will unravel an illegal transaction and establish the status quo as far as possible, where a corporation acts in opposition to an express prohibition of law, notwithstanding that acceptance of benefits would, as to acts merely ultra vires, in the proper sense of the term, demand that the transaction stand. Strickland v. National Salt Co., 81 Atl. 828.

In this case the receivers of a corporation acting in the former way were held authorized to have set aside an arrangement whereby the corporation had come into control of another corporation, and thus avoid payment of what was agreed upon therefor.

The court thus treats the distinction we refer to above, in referring to a case relied on as against the receivers' contention: "The doctrine of that case is applicable only to ultra vires contracts in the proper sense of the term, that is to say contracts which are beyond the statutory powers of the corporation. It is not applicable to contracts expressly prohibited by statute and contrary to the public policy of the legislature. The opinion of the court clearly recognizes the distinction, for in speaking of the case of Kent v. Quicksilver Mining Co., 78 N. Y. 159, Mr. Justice Van Syckle says: 'The propositions maintained by the court, were that acts of a corporation, which are not per se illegal or malum prohibitum or contrary to public policy, but which are ultra vires, affecting only the interests of stockholders, may be made good by assent of shareholders, so that strangers to them, dealing in good faith with the corporation, will be protected in reliance on these acts.' * * * The present case comes within the class of transactions forbidden by statute, and therefore illegal and outside even of the liberal rule of the case just cited."

This distinction seems, perhaps, better recognized as a principle than always forcible in application, but why it should not be severely enforced there seems no sufficient reason. It is constantly said a corporation has no power than that expressly granted and to do what is incidental thereto. An exception has been recognized as to acts "ultra vires in the proper sense of the term," and this exception is proper, because otherwise individuals incorporating in their own interest could make of incorporation not only a shield but a sword. To go beyond that, however, would be to nullify express public policy and erect immorality into law. We think it well to stress importance regarding the distinction we discuss.

CORPORATIONS — CORPORATE STOCK IN ASSOCIATION ORGANIZED FOR SOCIAL PURPOSES.—An association for other than business purposes—purposes of gain—with membership represented by corporate shares, either in whole or in part, seems something of an anomaly. If the ownership of a share or shares is one of the necessary qualifications of membership this would seem a radical inconsistency. We judge that the corporation referred to in Coulombe v. Eastman, 81 Atl. 704, decided by Supreme Court of New Hampshire, did not make the ownership of stock a test of membership, though the statement of facts and opinion in the case do not make this entirely clear.

Taking it then, that the issuance of shares was a mere means for raising a working capital, is there not, nevertheless, such a departure from the objects of an association as to make it a corporation for a gainful object?

If the stock is a bona fide issue, then it is the duty of the directors to so conduct the affairs of the association as to make it pay investors in its stock. This duty becomes paramount; the social or benevolent features are perverted, it may be said. In the case of a

benevolent or charitable corporation, it would be like an attempt to serve both God and Mammon, an attempt in morals, and supposedly in law, not permissible.

The New Hampshire Court thought that: "Notwithstanding the shareholders take nothing until the other creditors are paid, the mere fact that the money they provided to pay the club's debts is represented by stock, does not conclusively establish that the club is a corporation 'whose object is a dividend for profits.'"

We think, if the charter thus provided, the corporation is that and can be nothing else. If this was an arrangement after charter by by-laws, it was not, because the association would have no power to erect itself into another kind of corporation without statutory aid. It is to be regretted the report of the case is not a little more specific.

REPORT OF THE COMMITTEE ON REFORM IN PROCEDURE TO THE OKLAHOMA BAR ASSOCIATION.

Through the courtesy of Hon. James R. Tolbert, Judge of the District Court at Hobart, Oklahoma, we have been favored with a copy of the report of the committee on reform of procedure of the Oklahoma Bar Association, which he as chairman, recently laid before the association.

The report makes some radical departures that will probably shock some of our more conservative friends, but we feel convinced that the demand for reform in procedure is so insistent that the entire profession must lay aside their present indifference and assist in correcting the evils so loudly complained of.

Following the report of the committee we publish an argument of them by Judge Tolbert himself, the chairman of the committee.

The report is as follows:

Report of the Committee on Judicial Administration and Remedial Reform.—We recommend that the Association endeavor to have enacted by the legislature laws which will bring about the following reforms:

(1) An indictment or information should be short and simple. It should briefly state the nature of the crime and only such facts as are necessary; (a) to enable the accused to know what the offense is and where and when committed, and (b) to enable the court to enter such a judgment as will prevent a second prosecution for the same offense. All of this could be stated in five or ten lines.

(2) In criminal actions the accused should be allowed to remain silent, but his silence ought to be a fair subject for comment. The state should have the right in an orderly way to compel him or anyone else, to produce any paper or thing that may be important in the trial.

(3) The plea of insanity should be in writing, and filed when the defendant is arraigned, and should include a bill of particulars of the times, places, circumstances and witnesses to be relied upon to prove it. This is not a constitutional defense. The estate and society have certain rights as well as the defendant, and if this plea is relied upon, the state should have this timely notice.

(4) Hypothetical questions in all criminal actions should be abolished.

(5) Perjury should be more promptly prosecuted and punished. It is a growing evil and a great hindrance to justice.

(6) On the qualifications of jurors, the right of examination should be greatly reduced and left largely to the discretion of the court.

(7) When a motion to suppress a summons or service thereof is sustained, the defendant should be required to plead or answer within ten days.

(8) In civil actions each party should be authorized to serve the other with written questions, and the adverse party should be required to file such questions with his verified answers thereto within a specified time, with the clerk of the court.

(9) The general denial should be abolished. The answer should consist of (1) admission; (2) specific denials, and (3) affirmative defenses and avoidance. All material allegations in the petition not specifically denied, should be considered as admitted, and a defendant should not be permitted to deny an allegation that he knows is true.

(10) The statute of 1910, authorizing the service of process by mail, etc., should be amended so as to include the service of subpoenas upon witnesses by telephone and telegraph.

(11) When a petition is filed, as soon as the issues of law are settled, the parties should be required to either demand or waive a jury under rules prescribed for the District and County Courts by the Supreme Court, and if demanded, to pay a jury fee of five dollars in the District Court and three dollars in the County Court for the use of the county.

(12) The District Court should be allowed to limit the argument of counsel in all felony cases except capital, to not less than one hour on a side.

(13) Ample provision should be made for the transfer of District Judges from one district to another by the mandatory order of the Supreme Court or the Chief Justice thereof.

(14) District Judges should be paid their actual expenses while holding court out of their home county, including costs of transportation and not exceeding two dollars per diem for board. This would enable the District Judges to hold quite a number of special and adjourned terms of court in each county during the year, and thereby expedite the administration of the law.

(15) Courts of record should be open all the year for the trial of criminal actions and to settle issues of law in civil cases upon timely notice under such rules as the trial court may prescribe.

(16) The transfer of any action, criminal or civil, from the Superior to the District Court or from the District and County Courts to the Superior Court, should be authorized upon motion of either party to the action, in the discretion of the presiding judge.

(17) The District Courts of this state should have equitable jurisdiction in all felony cases where the defendant is a minor, to deal with the criminal and not with the crime, by parol or otherwise, as the Court might determine.

(18) The District Court should have parole jurisdiction in all felony cases where the defendant is over twenty-one and under twenty-five, years of age, except in cases of homicide.

(19) The District Court should have parole jurisdiction in all felony cases where the defendant is over twenty-one and is a female, except in cases of homicide.

(21) All sections of the codes of procedure in relation to appeals in civil and criminal actions should be repealed. Appeals to the appellate courts should be perfected under rules provided by such courts. And we suggest in this connection that upon the filing of a praecipe, the clerk of the trial court should transmit to the clerk of the appellate court the files in the case (except dead matter), together with a certified transcript of the orders of the trial court in relation thereto and an official transcript of the evidence by the Court Reporter, if demanded, and these records should constitute the case-made, subject to such rules as to the filing of briefs and the completing of the record in the appellate court as such courts might make.

(22) In taking depositions all questions should be consecutively numbered.

(23) Statutes should deal only with the general forms of procedure, leaving the details to the rules of court.

(24) The defendant in a capital case should not be allowed to disqualify a juror on the ground of conscientious scruples.

(25) Any further time to plead or answer after answer day should be left to the discretion of the trial judge.

(26) The standard of the profession should be raised from a moral and ethical point of view. Habitual drunkards are not qualified to serve as jurors, neither should they be authorized to appear before juries armed with a law license. A simple procedure should be devised to quickly disbar the unworthy, the dishonest and the criminal from the profession. The bench and the bar should see to it that the dignity of the profession is maintained.

Respectfully submitted,
JAMES R. TOLBERT.
Chairman.

ARGUMENT IN SUPPORT OF THE RECOMMENDATION OF THE COMMITTEE ON REFORM IN PROCEDURE OF THE OKLAHOMA BAR ASSOCIATION.

The question of law reform is being considered and discussed by the bench and bar throughout the entire country. Presidents Taft and Roosevelt thought it sufficiently important to call the attention of Congress and the Nation to it in their message. The American Bar Association and the Bar Associations of the various states have been studying and agitating the subject for years and criticising the administration of the law so severely, its delay in the trial of cases and reversals on technicalities, until it is thought a great necessity exists for such reform, and especially in matters of procedure. The sentiment for legal reform which placed harmless error provisions in the Constitutions of the States of Oregon and California is a protest against this condition. Likewise the recall of judges is intended as an extraordinary remedy for an extraordinary necessity. It is the duty of the bench and bar throughout the country to assist in

the correction of any errors existing in our procedure.

The writer calls the attention of the profession and the people generally to the procedural reforms suggested in this report and ventures some suggestions and observations in relation thereto. An indictment or information should be sufficient if it enables the accused to determine what the offense is and when committed, and to enable the Court to render judgment thereon. This is covered by section One of the report. In regard to Section Two, our present procedure, forbidding reference to the failure of the accused to testify in a criminal action is a relic of the dark ages, and should not be the law in this enlightened period. The latter part of this section is of doubtful constitutionality. Sections Three and Four need no explanation. All who are familiar with the trial of criminal cases when the plea of insanity is relied on, will approve these reforms, unless it be the skilled lawyer who is ever-zealous of the rights of the accused and too fond of the rules of the "game" as now played, without regard to the expense of these long-drawn out criminal actions to the taxpayers of the state. Six needs no comment. Seven is so in accord with the modern trend of law reform that no good citizen should oppose it. To permit a defendant to come into court for the purpose only of notifying the court that he has no notice of plaintiff's suit and require the expense and delay necessary to get out a new summons and have served upon him, is not only frivolous, but ridiculous. Section Eight would prevent a great many fictitious defenses made only for delay, and save time and expense in the administration of the law.

The profession will differ as to the reforms suggested in Section Nine, and the writer does not consider it so important as other provisions of the report. The recommendation in Section Ten is very important to taxpayers and to those officers of the state who sincerely desire to administer the law impartially, speedily and at the least expense possible. The necessity of this reform was suggested to the writer soon after he took up the duties of a district judge after statehood. Just why the taxpayers of the county should be required to pay a sheriff to go out twenty miles into the country and notify a citizen in person that he was drawn to serve on a jury, he could not understand, when such citizen could be notified over the telephone or by letter at a nominal cost. Upon investigation it was found that law reform in this respect is one hundred fifty years behind the times. We are using the same cumbersome machinery in the administration of the law that was in use before the United States Mail system was established, or the telegraph and telephone invented.

Often, as Judge of the court I ordered the attendance of jurors and witnesses by mail and by telephone without legal authority, but with much success. I recognize that no corporation or business concern would use the expensive machinery used by our courts, and so feeling in February, 1910, I prepared a bill to authorize the summoning of jurors for the district and county courts and witnesses in both civil and criminal cases *in person over the telephone, by telegraph or by mail, registered or ordinary,* at the option of the litigant ordering the service. I called attention of the legislature by circular letter to the necessity of such a law, and also to Governor Haskell, who promptly submitted the matter by special message, and the bill became a law, amended however, as to not authorize a witness to be subpoenaed by telephone or telegraph. This section recommends that this law be amended to authorize such service. It should be done. Since this law was passed, as District Judge, I have experimented with the procedure by ordering jurors summoned by telephone, by mail, ordinary and registered, with equal success. I have found but one juror who declined to obey the summons by mail, and I hardly think he will do so again. In my district witnesses in both criminal and civil cases are served by telephone, and they promptly obey the service

without direct statutory authority. Recently in the trial of a criminal case in Washita county, in the middle of the afternoon, the state desired an important witness from El Reno. The telephone did the work and the witness was in attendance when court convened next morning..

The principle involved in Section Eleven enacted into law would save the already burdened taxpayers of this state thousands of dollars, and enable the trial courts to intelligently make up the trial calendars. Sections Twelve to Sixteen inclusive involve questions of procedure which would tend to make litigation less expensive and make the procedural machinery of our government more flexible. Sections Seventeen, Eighteen and Nineteen involve principles of law deeper and wider than forms of procedure. No one familiar at all with criminology will oppose the principle of parole. In my opinion, as a general rule, minors should not be sent to the State Penitentiary for the first offense. There would be exceptions, of course. Give the boy another chance under rigid rules of parole. Sections Twenty-one to Twenty-five relate to procedure only, and sooner or later will be adopted in this state.

The last suggestion in the report relates to the lawyer, and not to the law. The scoundrel armed with a license to practice law is the exception and not the rule by any means. But we have the exceptions in our state. The bench and the bar owe it to the state and to the profession to let none enter this great calling who are not qualified mentally and morally for the work. And here I quote from Woodrow Wilson in his great address to the American Bar Association of 1910. "We are lawyers. This is the field of our knowledge. We are servants of society, officers of the courts of justice. Our duty is a much larger thing than the mere advice of private clients. In every deliberate struggle for law, we ought to be guides, not too critical and unwilling, not too tenacious of the familiar technicalities in which we have been schooled, and too much in love with precedents and the easy maxims which have saved us the trouble of thinking, but ready to give expert and disinterested advice to those who purpose progress and the readjustment of the frontiers of justice. Our reforms must be legal reforms. It is a pity they should go forward without the aid of those who have studied the law in its habit as it lives, those who know what is practical and what is not, those who know or should know if anybody does, the history of liberty. Some radical changes we must make in our law and practice. Some reconstruction we must push forward which a new age and new circumstances force upon us. But we can do it all in calm and sober fashion, like statesmen and patriots. Let us do it also like lawyers. Let us lend a hand to make the structure symmetrical, well proportioned, solid, perfect. Let no future generation have cause to accuse us of having stood aloof, indifferent, half hostile or of having impeded the realization of right. Let us make sure that liberty will never repudiate us as its friends and guides. We are the servants of society, and bond-servants of justice."

JAMES R. TOLBERT.

Hobart, Okla.

ARE AGREEMENTS WHICH PROVIDE FOR EMPLOYMENT OF UNION LABOR, EXCLUSIVELY, INVALID AS CONTRARY TO PUBLIC POLICY?

Should an agreement to employ union labor exclusively be upheld as valid?

The first case in the United States on this subject was that of Curran v. Galen,[1] decided in 1897. In that case all the employers of a certain class of labor in that community agreed to employ union labor exclusively. The plaintiff in that case having refused to join the organization, the union procured his discharge; whereupon he sued the members of the union and recovered. Subsequently the case of Jacobs v. Cohen was decided,[2] this case approving the doctrine announced in Curran v. Galen.

When the Jacobs v. Cohen case came to the

(1) 152 N. Y. 33.
(2) 99 App. 481, (N. Y.)

New York Court of Appeals in 1905,[3] it distinguished the case of Curran v. Galen and reversed the decision in Jacobs v. Cohen. In the case of Jacobs v. Cohen,[4] where there was an agreement providing for the employment of union labor exclusively, it was said at page 210: "Whatever else may be said of it, this is a case of an agreement voluntarily made by an employer with his workmen which bound the latter to give their skilled services for a certain period of time upon certain conditions regulating the performance of the work to be done and restricting the class of workmen who should be engaged upon it to such persons as were in affiliation with the association organized by the employers' workmen with reference to the carrying on of the very work. It would seem as though an employer should be unquestionably free to enter into such a contract with his workmen for the conduct of the business without its being deemed obnoxious upon the ground of public policy. If it might operate to prevent some persons from being employed by the firm or possibly from remaining in the firm's employment, that is but an incidental feature. Its restrictions were not of an oppressive nature, operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livelihood. It was but a private agreement between an employer and his employees concerning the conduct of the business for a year and securing to the latter an absolute right to limit the class of their fellow workmen to those persons who should be in affiliation with an organization entered into with the design of protecting their interests in carrying on the work."

In Mills v. U. S. Printing Co.,[5] it was said: "The discharges in the case are the result of the agreement between the printing company and the union. It is clear enough that the company made the agreement in order to end the strike and the boycott. Thus, the defendants secured the exclusive employment of their members, an adjustment of wages and a determination of working hours * * * If the employer preferred to have the workmen work for him on the conditions that he should employ none but their fellows, increase their wages, and settle the hours of labor, than to have them strike and organize a boycott, I cannot see why in the exercise of its right to regulate its own affairs it could not follow this course and make the agreement. There is a manifest distinction well recognized between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case the action of the combination is primarily for the betterment of its fellow members. In the second case, such action is primarily 'to impoverisn and crush another' by making it impossible for him to work there, or, so far as may be possible, anywhere * * * 'The case is not within the principle of Curran v. Galen (152 N. Y. 33). Upon the facts of that case as they were admitted by the demurrer to the complaint, the plaintiff was threatened, if he did not join a certain labor organization, and so long as he refused to do so, with such action as would result in his discharge from employment and it was an impossibility for him to obtain any other employment anywhere, and in consequence of his continuing his refusal to join the organization, his discharge was procured through false and malicious reports, affecting his reputation with members of his trade and with employers.' "

In Kissam v. U. S. Printing Co.,[6] decided in June, 1910, this being the highest court of New York, and, so far as I can ascertain, the latest opinion from the courts of that state, in a suit by an employee, who was also a stockholder, for an injunction against an agreement providing for the employment of union labor exclusively, it was said: "The learned trial court found that the execution of the agreement between the United States Printing Company and the several labor unions resulted in great financial benefit to the former, and disposed of the difference between the parties; that the agreement was not entered into for the purpose of gratifying malice against the non-union employees of the printing company or of inflicting injury upon them; that it was not the object of the defendants to compel the plaintiffs to join the unions; that no pressure, so imperative as to amount to compulsion, was exerted upon the printing company, and that there was no conspiracy to compel the plaintiffs to join the unions or solely to injure them in their employment. Upon these findings of fact the learned trial court based the legal conclusions that the agreement was in all respects lawful; that it was not entered into under duress; that no unlawful act had been committed by the defendants, and that the complaint should be dismissed. These conclusions are in accordance with the decisions of this court arising out of similar or analogous decisions (National Protective Assn. v. Cummings, 170 N. Y. 315;

(3) 183 N. Y. 207.
(4) 183 N. Y. 207.
(5) 99 App. Div. (N. Y.) 605, l. c. 612 (1904).
(6) 199 N. Y. l. c. 79.

Jacobs v. Cohen, 183 Id. 207; People v. Marcus, 185 Id. 257 * * * .)"

In Martin on Modern Law of Labor Unions,[7] the author summarizes the effect of the New York decisions on this question, as follows: "Briefly stated the following are the rules deducible from the New York decisions; a contract between an association of all the employers of labor engaged in the same line of business in a single community by which it was agreed that the employees of individuals composing the association shall be exclusively members of the union, and that no employee shall work for a longer period than specified by the contract without becoming a member is against public policy and void. But a contract between an individual employer and a labor union, by which the employer binds himself to employ and retain in his employ only workmen who are members of the union and only such members as are in good standing is not against public policy and is valid."

The case of Berry v. Donovan,[8] holding contrary to the rule as just stated, followed the case of Curran v. Galen and the case of Jacobs v. Cohen in the lower courts though, the case of Curran v. Galen was subsequently distinguished and the decision of the lower court in the case of Jacobs v. Cohen was subsequently overruled. Therefore the principle announced in Berry v. Donovan was based upon citations which are no longer considered as an authority on the direct question involved here.

The quotation from Beach on Monopolies, from Curran v. Galen, for the reason that that case has been distinguished, cannot be considered as good authority for the appellant's position on this question.

The case of Berry v. Donovan was an action where there had been a malicious interference with the employment of the workmen, and whatever was said with reference to labor unions and the policy of entering into agreements to employ their members exclusively was outside of the proper scope of the opinion and should be regarded as dicta. Furthermore in that case the court took particular pains to say "whatever the contracting parties may do if no one but themselves is concerned, it is evident that as against the workman a contract of this kind does not of itself justify interference with his employment by a third person who made the contract with his employer"; thus clearly showing that it was not passing on the validity of the contract but on the question whether such a contract justified a malicious interference with the position of the employee.

(7) Page 217.
(8) 188 Mass. 353.

In National Fire Proofing Company v. Mason Builders' Assn.,[9] affirmed by the Circuit Court of Appeals,[10] the rule of the later New York decisions is followed and approved, the court in that case at page 263, saying: "If the contract is a conspiracy for the purpose and with the effect alleged by the complainant, and has been carried out by threats and intimidation, as stated in the affidavits, then a case is presented of an unlawful conspiracy to deprive the complainant of its liberty and property. If the purpose of the agreement was to coerce those who were not parties to it, the case would be brought within the principles discussed in Curran v. Galen, 152 N. Y. 33. There the court held that, if the purpose of an organization was to coerce their workmen to become members of an organization under penalty of loss of position and deprivation of employment, it would be within the principle of public policy which prohibits monopolies and exclusive privileges * * *.

"It is claimed for the reasons set forth * * * that this agreement was entered into for the mutual advantage of the parties, in the line of avoidance of strikes and the opportunity for control by contractors of an entire contract, in permitting the bricklayers to do all the brick work on a certain building, so that having done the outside work, exposed to the inclemencies of the weather, they might also do the inside work and obtain better and fuller wages. If the facts be as contended by the defendants, there is nothing unlawful in this agreement. The rights of capital and labor are equally protected by the law in the making of such contracts as are for the best interests of the parties concerned, in the absence of any proof of any act or motive other than that which is justified by the law. Indeed it is difficult to see upon what theory the court could enjoin the defendants from carrying out the agreement. * * * The very recent decision of the Court of Appeals in Jacobs v. Cohen, 183 N. Y. 207, shows that the question of law depends upon whether there is coercion by threats and by the unlawful use of power and influence in keeping other persons from working at their trade, and procuring their dismissal from employment, as in Curran v. Galen, or a lawful agreement made by an employer with his workmen, regulating the performance of their work, and restricting the class of workmen to such persons are in affiliation with the association of the employer's workmen, provided the restrictions are not oppressive."

CHARLES M. POLK.

St. Louis, Mo.

(9) 145 Fed. 260.
(10) 169 Fed. 259.

MASTER AND SERVANT—INTERFERENCE WITH EMPLOYMENT.

CHAMBERS v. PROBST.

Court of Appeals of Kentucky, Nov. 16, 1911.

140 S. W. 572.

One making false and malicious statements to an employer as to the manner in which an employee performs his duties, resulting in the employee's discharge, is guilty of actionable wrong, though the employment is for an indeterminate period, and though damages caused by an interference with the right to labor resulting from competition are not recoverable.

LASSING, J.: W. E. Chambers was in the employ of the Louisville & Nashville Railroad Company as a day laborer. He was a watchman at one of the street crossings of said company in the city of Louisville. He lost his position with the company, and, conceiving that his discharge was brought about by the unwarranted, unlawful, and malicious intermeddling of one W. G. Probst, he instituted a suit against him to recover damages alleged to have been sustained by reason of his discharge. In his petition he in substance alleged that, by reason of false and malicious statements made by Probst to his employer, relative to the manner in which he had discharged his duties as watchman at the public crossing, he had lost his position. A demurrer was sustained to this petition, and plaintiff's suit dismissed. He appeals, and here raises the question, Is it an actionable wrong to unlawfully interfere with one's right to labor?

* * * *

Courts of last resort generally agree that it is an actionable wrong to interfere with one's right to labor without justification. The difference arises out of a determination of what acts are justifiable and what not. It is universally agreed that any interference with the right to labor which is the result of competition is justifiable; and, although injury or damage may result from such interference, no cause of action exists to the party aggrieved, because while one has the right to the peaceable and undisturbed enjoyment of his right to labor, and is to be protected in same, this protection only goes to the extent of guarding it against unlawful interference. It will not be protected against competition, for such a course would be to create monopoly, a condition looked upon as injurious, not only to the individual, but to the growth and development of the country as well. It was upon this idea that the acts complained of in the cases of Chambers & Marshall v. Baldwin, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545; 34 Am. St. Rep. 165, and Bourlier Bros. v. Macauley, 91 Ky. 135, 15 S. W. 60, were decided. Chambers & Marshall and Baldwin were engaged in the same business, the purchase of leaf tobacco. Bourlier and Macauley operated rival theaters. And in each case the basic principle upon which the opinion is rested is that, as the acts complained of were the result or outgrowth of competition, no ground of complaint was afforded the aggrieved party, although in each of those cases it was inferentially held, if not expressly decided, that, if the injury had been brought about by the exercise of either fraud or force a different case would have been presented, the court evidently proceeding upon the idea that even those engaged in competitive business may not, in the prosecution of their business, resort to other than legitimate means to outstrip their rivals. Appellant and appellee were not competitors in business. Appellee was not seeking the employment held by appellant. The demurrer to the petition confesses the truth of the allegation that appellant's discharge was brought about through the false and malicious statements made by appellee to his employer. They were wantonly made, without excuse other than to satisfy a spiteful or revengeful disposition. If it should be held that such an act was not unlawful, then appellee could pursue appellant and secure by such questionable means his discharge from any employment which he might hereafter receive, and totally deprive him of an opportunity of making a living by the exercise of his right to labor. To so hold would be to place it within the power of the wealthy and influential to reduce to a state of beggary any one against whom a grievance, real or imaginary, might be entertained. Such a position has but to be stated to show how utterly untenable it is. The acts complained of are clearly unlawful.

It is next insisted for appellee that, as the employment was for an indeterminate period, no recovery can be had. This identical question was decided in W. D. Chipley v. Wayne K. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367, wherein the court, after reviewing all the authorities in this country and in England upon this subject, concludes as follows: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or

to refuse to perform his agreement is of itself not a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it, but so long as the former is ready and willing to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it. Such wanton and malicious interference for the mere purpose of injuring another is not the exercise of a legal right. Such other person who is in employment by which he is earning a living or otherwise enjoying the fruits and advantages of his industry or enterprise or skill has a right to pursue such employment undisturbed by mere malicious or wanton interference or annoyance."

And the Supreme Court of Massachusetts in the case of Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, in passing upon this identical question, said: "The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time, does not affect the right to recover. It only affects the amount that he is to receive as damages."

These decisions upon this point are supported by Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252, Lucke v. Clothing Cutters' & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421, and London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185. We are of opinion that appellee may not excuse himself from the result of his unlawful act because appellant's employment was for an indeterminate period. This fact affords him no ground of relief.

We are of opinion that it is an actionable wrong to unlawfully interfere with one's right to labor, and that it is unlawful to make to an employer false and malicious statements concerning the manner in which the employee discharges his duties. The petition stated a cause of action.

Judgment reversed and cause remanded for further proceedings consistent herewith.

NOTE.—*Justifiable Reasons for Procuring Discharge of Employee.*—It may be said that authority is too nearly, if not altogether, one way, and it may even be said it is the latter, that procuring discharge of an employee for no sufficient reason gives an action for damages that cases on this are unnecessary. It seems interesting, however, to notice a few cases which discuss the reasons, as being or not sufficient. In a late case decided by Supreme Judicial Court of Massachusetts it is held, in effect, that good faith in such procurement is not the test of liability *vel non*. De Minico v. Craig, 207 Mass. 593, 94 N. E. 317. In this case the finding of the referee was that a strike was ordered so as to compel, and which did compel, the discharge of a foreman, because he was "distasteful to some of the employees." The court said: "We are of opinion that that is not a legal purpose for a strike. The plaintiff had a right to work and that right of his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what is 'distasteful' to some of them is not, in our opinion a superior or an equal right. It is doubtless true that in a certain sense the condition of workmen is better if they work under a foreman for whom they do not have a personal dislike. But that is not true in the sense in which those words are used, when it is said that a strike to better the condition of the workmen is a strike for a legal purpose. * * * The defence in the case at bar does not fail because a strike to get rid of a foreman never can be a strike for a legal purpose. We can conceive of such a case. If, for example, a foreman was in the habit of using epithets so insulting to the men that they could not maintain their self-respect and work under him, a strike to get rid of him in our opinion would be a legal strike." A judgment in favor of plaintiff against the president and secretary and certain other members of a workingmen's union was sustained.

It would appear from a North Carolina case that under certain circumstances one may in good faith state to an employer that which would cause an employe's discharge and subject himself to no liability therefor, though he has no interest to subserve in the discharge being brought about. Thus in Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481, it was said: "It is not to be understood by anything said in this opinion that one employer cannot inquire of another of the character and habits of a former employee of that other, and that an answer made in good faith and upon a knowledge of facts and acted upon by the recipient would subject the giver of the information to suit for damages." This case held an informer liable for volunteering information by a former to a subsequent employer, but the case was on rehearing reversed mainly, as we read the second opinion, upon the ground that the action did not lie where the employer had the right to discharge at any time, the case thus differing with the principal case and those it cites on this question and with, we think, the decided weight of authority. S. C. 138 N. C. 308, 50 S. E. 681. As also supporting the principal case on this point, see Blumenthal v. Shaw, 77 Fed. 954, 23 C. C. A. 290; Curran v. Galen, 152 N. Y. 33, 37 L. R. A. 802, 46 N. E. 297, 57 Am. St. Rep. 496; Doremus v. Henessy, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, 68 Am. St. Rep. 203.

In Berry v. Donovan, *supra*, the facts show that a labor union had an agreement with a

shoe company not to "retain any shoeworker in its employment after receiving notice from the union that such shoeworker is objectionable to the union, either on account of being in arrears for dues, or disobedience of union rules or laws or from any other cause." Plaintiff's discharge was procured upon the ground that he was not a member of the union and persistently declined to become such. The plaintiff's recovery was sustained, the court saying: 'This provision purported to authorize the union to interfere and deprive any workman of his employment for no reason whatever, in the arbitrary exercise of its power. Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment by a third person who made the contract with his employer. No one can legally interfere with the employment of another unless in the exercise of some right of his own which the law respects." The court then discusses the claim of competition justifying the defendant, but holds such interference had no relation to the competition of workmen with each other and that labor unions are organized, not to promote, but to suppress competition with each other. Further, the court thought, that it was not within the theory of the right of labor by combination to better their condition, "to drive men out of employment because they choose to work independently." It said such a right would be "by force to obtain a monopoly of the labor market."

In Jacobs v. Cohen, N. Y., 76 N. E. 5, 2 L. R. A. (N. S.) 292, there was a question of the validity of a contract for an employer not to employ any but members of a particular labor union and this was recognized, but the court is careful to say that the case of Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496, was not overruled. In the latter case a labor union forced the discharge of a nonmember workman. It was sought by defendants to justify their right of interference under a contract with the employer similar to that in the Berry case. The court thought that the contract "could not legalize a plan for compelling other workingmen to join defendant's organization, at the peril of being deprived of employment and of making a livelihood."

As said above, good faith is not the test of no liability and *e converso* it is to be said that malice is not the test of liability. Thus the Supreme Court of Ohio ruled that no liability was incurred by a patron of street railways who reported the misconduct of a conductor toward him as a passenger, though in making such report he was actuated by ill will and a desire to effect his discharge. Lancaster v. Hamburger, 70 O. St. 151, 71 N. E. 280, 65 L. R. A. 856. The court said: "It is immaterial by what motive one is prompted to exercise a clear legal right." Then it was said: "The record does not admit a doubt that the defendant exercised a legal right, if, indeed, he did not perform a duty in making complaint to the superintendent of the company of the plaintiff's misconduct."

These illustrative cases may be said to present the status of justifiableness or not in procuring the discharge of another and to give a fair survey of the general principles that may be applied to this character of question. C.

CORAM NON JUDICE.

A LAWYER'S START—A CHARGE TO THE YOUNG LAWYER.

Judge J. W. Donovan, of Detroit, sends us the following advice to young lawyers:

As the charge to the jury is the last voice before they retire, may I say: If you can believe from the experience of one who has watched it for thirty years—12 in practice and 18 on the bench—

1st. It pays to start poor so that you must hustle like a newsboy to make a living.

2nd. If you get ahead you must work for it—not wait for it. It is a battle at best to earn fees and win law suits.

3rd. Keep your office in good condition. Your client's money separate from your own. Make a bargain on charges and get a down payment before you do much for clients.

4th. It takes genius to hold clients, to get fees early; and genius to select juries; tact to handle witnesses; courage to not cross-examine a smart woman or a small boy.

5th. A skilled lawyer will not try to rule the court or ill-treat a witness. He will quit at a sharp point and not dull his case by wasting time on trifles.

6th. A good lawyer likes his fellowmen, cheers others, greets them frankly, pleases when he can, is trusty and every inch a man.

7th. All men are not alert, or eloquent, or wise; but all can be diligent, forceful and upright. Count your client as your brother; fight his battle to a finish; fight fairly—the jury will lick you if you are unfair.

8th. Finally: Think when alone. Learn to convince in your reasons. You will get many setbacks; you will trip and fall often, as one said: "You are beaten to earth?" Well! well! What of that? Come up with a smiling face. It is not against you to fall down flat, but to lie there that's disgrace. The harder you fall the higher you bounce. Be proud of your blackened eye. It isn't the fact that you're licked that counts. It is, how did you fight and why!

BOOK REVIEWS.

SALEILLES' INDIVIDUALIZATION OF PUNISHMENT.

By Raymond Saleilles; translation from the second French edition by Rachel Szold Jastrow; Modern Criminal Science Series IV. Boston: Little, Brown & Co., 1911. XXXVIII + 322.

This book not only passes in review the whole movement of the last 125 years to find a sure foundation and justification for the punishment of crimes, but passes judgment on its various faces, and tries to evolve a theory of its own.

Whenever and wherever this question comes up, we at once meet the old quarrel between those believing in the freedom of the will, and the determinists; between those looking upon crime as a sin needing expiation, and those considering it a disease needing cure; between those looking upon punishment as an act of justice, and those considering it from the utilitarian standpoint as an act of self-defense by society.

There are probably very few criminalists to-

day—if any—who take their standpoint squarely on any one of these grounds. All are more or less electivists; and our author is a pronounced type of them. This is of great advantage to those who here, for the first time perhaps, are being introduced to modern thought upon this matter, because all schools are treated fully and impartially.

The author passes in review the classic school, with its belief in the absolute freedom of the will, with its assertion that the same crime always deserves the same punishment, and its consequent mechanical application of the law and its fixed penalties. He shows us what a dismal failure this theory carried in its train, how of necessity it led to the multiplication of crimes, how the recidivist became the natural and almost necessary development of nearly every first gender.

He also reviews the determinist or Italian school, with its belief in the criminal type, and shows us, how it of necessity leads to the removal of all guarantees for personal freedom.

Then he holds these two theories up against each other and tries to part the winds impartially between them, and in this he seems to have succeeded uncommonly well.

He exposes the fallacy of the old theory of the free will; that every human being at any and all moments has the power to elect; he acknowledges that, given the circumstances, man could in most cases not act otherwise than he did.

But on the other hand, he will not subscribe to the determist theory; he maintains that man is responsible for his acts.

Man forms his own character, influenced, of course, by surroundings, by circumstances, by associations; but still it depends primarily upon himself whether he shall become a normal type of the society in which he lives, or whether his lot shall be that of the outcast, the revolter, the offender.

The freedom of will, the power of choice, the responsibility of man may not be able of scientific demonstration, any more than the existence of God and of a life hereafter, but the belief in such responsibility is rooted in the hearts of all men; this belief is a reality which cannot be denied, upon this belief rests the foundation of society, and no penal exercise of society's power can be applied, except upon the foundation of this social belief.

But while society firmly believes that every normal man is responsible for his acts, it does not share in the theory that the same act done by different men is evidence of the same moral depravity. Juries will acquit one man for exactly the same act, for which they will convict another. This is because in weighing the responsibility, they take into consideration the whole character of the man. This is a sound theory and the new and valuable addition which the Italian school has made to criminology, and to penalogy as well.

For if the man's whole character must be considered in judging his act, even more must it be taken into consideration in fixing the penalty therefor.

While one of the justifications of punishment may be, as a penalty for the shock given society's moral feelings, its primary justification lies in the protection it gives society against repetition by this same man. But it is not enough to remove the offender from his usual field of activities; the goal must be to teach him not to offend again. Hence individualization in punishment becomes a necessity.

How this can be brought about without taking away the safeguards of man's individual freedom, is shown by the author, and this forms one of the best, most interesting and most valuable parts of his book, but it would take too much time and space to take this up in detail.

In April, 1908, the writer of this review published in the "Legal Intelligencer" of Philadelphia, a short article called "Punishment and Its Justification," which is reproduced on another page of this issue of the Central Law Journal and the reader will find in that article a short summary of a theory somewhat like that of Saleille, although written without knowledge of the book.

The translation is uniformly very good; it is only to be deplored, however, that so few members of the bar are able to read the book in the original. While English is without doubt the best business language in the world to-day, and to some extent equally so for exact scientific expositions, when it comes to abstract matters, it cannot commence to compare with French, with its admirable logic, lucidity and incision. For this reason, and for this reason only, the translation suffers at certain points from a lack of clearness, and is at times hard to read. The English language with its wonderful richness in words, is poor in sharp and incisive words denoting abstract ideas; it becomes necessary, in order to give the meaning, to pile three or more words upon each other, with a consequent obscurity as the result.

We recommend this book to all members of the Bar; it is replete with instruction and inspiration, and it is written by a man, possessed of the judicial temperament to a extraordinary degree.

A. T.

HUMOR OF THE LAW.

A lawyer's favorite reply to an undesirable question from the bench is, "I am coming to that in a moment, if your honor please." Often that reply riles the blood of the justices. A Mr. Wilby was addressing the court when Justice Jackson asked a question which led to the reply from the counsel before the bar: "I am coming to that in a moment."

"You are right there now, Mr. Will-be," declared the justice, with an emphasis that left no doubt about the pun.

"Waal," said the constable, after some parley with Jinks, according to Harper's Weekly. "I reckon I know speed when I see speed, and, by glory, I'll bet ye $5 ye was goin' faster'n the law allows."

"I'll bet you five I wasn't," said Jinks. "And there's the money."

He paid the constable $5, and resumed his journey.

"They is suthin' in this sportin' life after all," chuckled the constable, as he folded up the bill and placed it in his pocket.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adjoining Landowners**——Damage from Snow.—Where defendant permitted snow to slide against plaintiff's house, and did nothing to prevent it, defendant was guilty of an actionable trespass.—Bishop vs. Readboro Chair Mfg. Co., Vt., 81 Atl. 454.

2. **Adverse Possession**—Character of.—To support a title by adverse possession the possession must have been of such a character and extent as to exclude the idea that the right of possession was in any one else.—Young v. Pace, Ky., 140 S. W. 555.

3.——Marking Boundaries.—Marking of the boundary of a tract claimed by plaintiff by adverse possession by following the lines of adjoining tracts owned by him is insufficient to show his hostile possession of the particular tract.—Le Moyne v. Hays, Ky., 140 S. W. 552.

4. **Appearance**—Process.—The constitutional guarantv that no valid proceeding can be had against one until he has been served by process, may be waived by a party voluntarily appearing and submitting himself to the court's jurisdiction, but where he appears only in response to process the service must be legal.—Odessa Loan Ass'n v. Dyer, Del., 81 Atl. 469.

5. **Assignment For Benefit of Creditors**—Validity.—Assignment of a debtor's interest in the proceeds of a policy to plaintiff more than three years before he made an assignment for the benefit of creditors held to establish a prima facie case in favor of plaintiff as against the assignee for creditors.—McGoodwin's Assignee v. Finn, Ky., 140 S. W. 575.

6. **Attachment**—Attaching Creditor.—In absence of fraud, the rights of an attaching creditor can be no greater than those of the debtor in the property attached.—Franz v. Vincent, Iowa, 133 N. W. 121.

7. **Attorney and Client**—Confidential Relation.—An assignment by a client to his attorney is not to be sustained if undue advantage exists.—Brackett v. Seavey, 131 N. Y., Supp., 664.

8.——Stipulation by Client.—The parties to a judgment can stipulate for dismissal of an appeal therefrom without the aid of their counsel.—Humptulips Driving Co. v. Cross, Wash., 118 Pac. 827.

9. **Bankruptcy**—Costs.—The fund realized from a sale of mortgaged property of a bankrupt corporation free from the lien of the mortgage, by consent of a majority of the bondholders secured, held properly chargeable with the reasonable costs and expenses incident to the sale and care of the property and the disbursement of the fund by the trustee.—In re Chambersburg Silk Mfg. Co., D. C., 190 Fed. 411.

10.——Lease as Assets.—A bankrupt's interest in a lease of real property passed to the trustee as of the date of the adjudication as provided by Bankruptcy Act, sec. 70a.—Crowe v. Bawmann, C. C., 190 Fed. 399.

11.——Practice.—Where an order of a District Court in bankruptcy has been taken to the Circuit Court of Appeals for review by an appeal or petition to revise, an application for a stay to prevent action by a party pending the decision must be made to the court, and cannot be granted by a judge.—In re Ironclad Mfg. Co., C. C. A., 190 Fed. 320.

12.——Preference.—Payment of a bankrupt's debt to a bank by a third person, instead of the bankrupt, held not material on the question whether such payment constituted a preference.—Wickwire v. Webster City Savings Bank, Iowa, 133 N. W. 100.

13.——Provable Debt.—A note taken by a wife for money loaned to her husband with which to pay a pressing matured obligation held properly allowed to her administrator against her husband's estate in bankruptcy.—In re Hill, D. C., 190 Fed. 390.

14. **Banks and Banking**—Collections.—A collecting bank is liable for the negligence of its subagents, in the absence of an express or implied contract that it would not assume such liability.—California Nat. Bank of Sacramento v. Utah Nat. Bank of Salt Lake City, C. C. A., 190 Fed. 318.

15. **Bigamy**—Evidence.—In an action for bigamy, the record of a divorce obtained from defendant by a former spouse, prior to his marriage to prosecutrix held admissible.—State v. McClelland, Iowa, 133 N. W. 111.

16. **Bills and Notes**—Illegal Consideration.—A note executed by defendant and her husband to induce plaintiff to release her husband from arrest in an action for conversion held not rendered unforceable against defendant by plaintiff afterward continuing the action upon

default upon the note.—Lauckner v. Heyss, 131 N. Y. Supp. 677.

17.——Extension.—Where the parties to a note after its execution and delivery make a contract, based upon an independent consideration, extending the time for the payment of the note, no recovery thereon can be had before the expiration of such extended time.—Condon Nat. Bank v. Rogers, Or., 118 Pac. 846.

18.——Holder.—Possession of commercial paper with indorsement makes a prima facie case of delivery by the indorser to the holder, and of ownership of the latter.—Linder Hardware Co. v. Pacific Sugar Corporation, Cal., 118 Pac. 785.

19.——Indorsement.—A depositor of a check under a definite agreement to consider it as cash becomes liable to the bank on his indorsement.—Downey v. National Exch. Bank, Ind., 96 N. E. 403.

20.——Pre-existing Debt.—In order for a pre-existing debt to constitute consideration for an indorsement of a note holder held required to show that he has given up the original debt or the right to sue on it.—Rogowski v. Brill., 131 N. Y. Supp. 589.

21.——Variance.—There was a fatal variance where the petition alleged that the notes sued on were executed by defendant to plaintiff, while the proof showed that they were executed to another, who indorsed them in blank to plaintiff.—Childs v. Jackson, Tex., 140 S. W. 511.

22. **Bonds**—Burden of Proof.—On plea of non est factum in a suit on a bond, plaintiff has the burden of showing genuineness of the signature.—Shoemaker v. Shoemaker, Va., 72 S. E. 684.

23. **Boundaries** — Monuments. — Where in ejectment the deeds called for natural and artificial monuments, the court properly refused to charge that courses and distances must give way to calls for lines of adjoiners, and charged that they must give way to calls for marked lines and natural objects.—Hurley v. Charles, Va., 72 S. E. 689.

24. **Carriers of Live Stock**—Damages. — A carrier failing to furnish cars for the shipment of live stock pursuant to its agreement is liable for the damages proximately resulting therefrom.—San Antonia & A. P. Ry. Co. v. Broad-Davis Cattle Co., Tex., 140 S. W. 514.

25. **Carriers of Passengers**—Continuing Relation.—Passenger on street car injured while making transfer held a passenger, and entitled to the protection due a passenger.—Koran v. Metropolitan St. Ry. Co., Kan., 118 Pac. 875.

26.——Negligence.—A railway company's liability for injury to a passenger who slipped upon car steps while alighting is not affected because the steps may have become slippery and muddy through a very recent rain.—St. Louis Southwestern Ry. Co., of Texas v. Gresham, Tex., 140 S. W. 483.

27. **Charities**—Torts.—A charitable corporation cannot escape liability for a tort against a stranger, because it holds its property in trust to be applied to purposes of charity.—Kellogg v. Church Charity Foundation of Long Island, N. Y., 96 N. E. 406.

28. **Common Law**—Maxims.—The common law maxim—interest reipublicae ut sit finis litium—is still in force.—Springfield Traction Co. v. Dent, Mo., 140 S. W. 606.

29. **Commerce**—Franchise Tax.—Imposition of a franchise tax on the right of a railroad company to use the streets of a city held not objectionable, because the railroad company is engaged in interstate commerce.—People ex rel. Hudson & M. R. Co. v. State Board of Tax Com'rs, N. Y., 96 N. E. 435.

30.——License.—That a telephone company was engaged in interstate commerce did not confer on it the right to permanently occupy city streets without permission from the proper authority.—Sunset Telephone & Telegraph Co. v. City of Pasadena, Cal., 118 Pac. 796.

31. **Contracts**—Breach.—A complaint for breach of contract to buy corporate stock is insufficient, if it fails to show obligation on plaintiff's part to sell.—Eustice v. Meytrott, Ark., 140 S. W. 590.

32.——Burden of Proof.—In assumpsit, it is incumbent on plaintiff to show by a preponderance of the evidence that there was a contract, express or implied in law, between plaintiff and defendant.—Knowles v. Massey, Del., 81 Atl. 470.

33.——Burden of Proof.—A buyer suing the seller for breach of contract must allege and prove performance or an excuse for nonperformance.—Iola Portland Cement Co. v. Ullmann, Mo., 140 S. W. 620.

34.——Construction.—The true meaning of any contract is to be ascertained from a consideration of all its provisions in their entirety, and not from a literal or technical construction of isolated or special clause.—Nave v. Powell, Ind., 96 N. E. 395.

35.——Discovery of Fraud.—A party induced to make a contract by the fraud of the other party thereto, may, on the discovery of the fraud, rescind the contract, or he may affirm it and sue for the deceit.—Kennedy v. Bender, Tex., 140 S. W. 491.

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